The Truth in Negotiations Act (TINA)

2006

Making a Comeback?

NCMA Hot Topics

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TINA Topics

- TINA – The Law
  - What & Why
  - Exceptions
  - History
- Cost or Pricing Data
- Adequate Disclosure
- Reliance
- Cut-Off Dates
- Certificate of Current Cost or Pricing Data
- Sweep
- Negotiations
- 5 Points for Proving Defective Pricing
- Sources of TINA Info

Why TINA?

- Public Law 87-653 (codified by 10 USC 2306a) was originally enacted in 1962 to place the Government on equal footing with the contractor
  - Gives the Government informational parity with contractors and subcontractors during (sole source) price negotiations so Government avoids excessive prices

Ultimate Goal = Fair and Reasonable Price

TINA – What it Does

- Defines requirements for obtaining cost or pricing data
  - Requires certification that data are current, accurate, and complete
- Delineates exceptions to the requirement
  - Addresses data submission for pricing of commercial items, below threshold contracts, and “other information”
- Provides right of Government to examine contractor records
- Defines cost or pricing data
- Provides rules governing defective pricing
  - Downward Contract price adjustment
  - Recovery of overpayments (cost & profit) & interest (as of 1985)

When Is Cost or Pricing Data Required Per TINA?

FAR 15.403-1(b)

- Required for contract actions ≥$550k if one of the following exceptions does not apply
  - Adequate price competition
  - Price set by law or regulation
  - TINA Waiver
  - Commercial Item
  - Modification to contract or subcontract for commercial item

When Is Cost or Pricing Data Required Per TINA?

- TINA Applicability
  - Contract actions include contracts, subcontracts, and modifications
  - TINA applicability is not affected by contract type
  - For subcontracts, the $550k threshold applies to the submission of data from the sub to the prime
    - TINA exceptions are the same for subcontracts
    - 15.404-3 requires analysis of subcontract prices by the prime and submission of the analysis
    - 15.404-3 requires subcontract cost or pricing data to be submitted to Gov't if subcontract exceeds 10% of proposed prime price (& $550K) or $10M, whichever is lower, unless the CO believes submission is unnecessary

Cost Proposals Subject to Certification

Example:

You issued a sole source undefinitized contractual action (UCA) subject to TINA on February 1 and the contractor immediately commenced work. The contractor submitted its cost proposal on March 15. The proposal included a variety of labor categories. Proposed labor hours were based on experience from similar programs. Its May 1st and you are preparing to negotiate. Should you expect to receive actual labor hours to date?

TINA Over Time- 80's

- FY86 Defense Authorization Act
  - Added requirement for interest on overpayments
  - Added "doubles" for knowing nondisclosures
- FY87 Defense Authorization Act
  - Added Government's non-reliance on cost or pricing data as legitimate defense to defective pricing
  - Added unacceptable defenses
    - Sole source or superior bargaining position
    - Contracting Officer should have known data were defective
    - Agreement was reach on total cost basis
    - Certificate was not submitted
  - Provided rules on offsets
- FY88/89 Defense Authorization Act, Provided definition of cost or pricing data

Strengthened in the 80's

TINA Over Time – 90's

- 1994, The DOD Regulatory Cost Premium: A Quantitative Assessment
  - Conducted for DOD by Coopers & Lybrand and TASC.
  - Identified average 18% premium paid by DOD for goods and services due to regulatory and statutory cost drivers
  - TINA was cited as #2 cost driver
  - Study performed at 10 contractor sites
  - Costs were determined by asking managers to estimate impact of substituting best commercial practices for DOD regulations and oversight
  - Study did not consider benefits resulting from DOD regulatory requirements

TINA Over Time – 90's

- 1994 Federal Acquisition Streamlining Act (FASA)/Clinger-Cohen Act
  - Created separate "commercial item" exception
  - Added prohibition on obtaining cost or pricing data when exception applies
  - Added hierarchy for obtaining info (cost or pricing data least preferable)
  - Increase TINA threshold every 5 years & make it $500k for all agencies
  - Changed approval level for TINA waivers from head of agency to head of procuring (contracting) activity
  - Added "other than cost or pricing data"

Weakened in the 90's

TINA Over Time – Since 2000

- 2001, Contracting Officer Determinations of Price Reasonableness When Cost or Pricing Data Were Not Obtained (DOD-IG)
  - CO's lacked valid exceptions and failed to require data in 32% of contracting actions reviewed
  - Inadequate documentation to support price reasonableness in 86% of actions reviewed
  - CO's did not challenge items categorized as commercial and accepted catalog prices/price lists without analysis
- 2002, DOD Needs Better Guidance on Granting Waivers for Certified Cost or Pricing Data (GAO Report)
  - Regarding type of data and analyses and outside assistance
  - Whether waivers should be granted in first place

TINA Over Time – Since 2000

- FY03 Defense Authorization Act
  - Major emphasis on “Exceptional Case Exception”
  - TINA Waivers: Section 817 directed the HCA may only issue waivers upon a determination that:
    - (i) the property or services being purchased by the Government cannot be reasonably obtained without the grant of the waiver;
    - (ii) the price can be determined reasonable without submission of cost or pricing data; and
    - (iii) there are demonstrated benefits to granting the waiver.

TINA Over Time – Since 2000

- FY03 Defense Authorization Act
  - (i) is a significant change to the previous requirements for obtaining TINA waivers – in the past, waivers were essentially granted on the basis of (ii) and (iii)
  - Congressional Reporting Requirements for waivers over $15M (also includes commercial items over $15M)

WHY?

Legislative Background cites GAO/IG Reports, DOD's use of flexibility provided over time, emphasis on waiver being an exception

TINA Over Time - Since 2000

- FY03 Defense Authorization Act
  - Impact – significant decrease in TINA waivers
  - Industry Reaction
    - Acquisition Reform Working Group Legislative Package for Year 2004 recommended repealing limitation on waivers
    - Acquisition Reform Working Group Legislative Package for 2005 recommended deletion of first criteria “the property or services cannot be reasonably be obtained…without the grant of the exception or waiver” as it is not necessary for assuring appropriate oversight

TINA Over Time - Since 2000

- FY05 Defense Authorization Act
  - TINA exception does not apply to noncommercial modifications of commercial items expected to cost >$500k or 5% of contract value (whichever is greater)
- Pending change to increase TINA threshold to $600k
- April, 2005, Army & Air Force both announced plans to convert large $ non-TINA compliant contracts to TINA compliant contracts

Has the Pendulum Started to Swing Again?

What Is Cost or Pricing Data?

FAR 2.101

- Cost or pricing data (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) all **facts** that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly.

What Is Cost or Pricing Data?

FAR 2.101

- Factual, not judgmental, are verifiable
- Don’t indicate accuracy of judgment about future estimated costs, but do include data forming basis of judgment
- More than historical accounting data - facts that can be reasonably expected to contribute to the soundness of estimates of future costs & validity of incurred costs

What Is Cost or Pricing Data?

FAR 2.101

- Includes such factors as
  - Vendor quotations
  - Nonrecurring costs
  - Information on changes in production methods and in production or purchasing volume
  - Data supporting projections of business prospects and objectives and related operations costs
  - Unit-cost trends such as those associated with labor efficiency
  - Make-or-buy decisions
  - Estimated resources to attain business goals
  - Information on management decisions that could have a significant bearing on costs

What Is Cost or Pricing Data?

Are These Examples of Cost or Pricing Data?

- Actuals for Labor Hours
  - Incurred to date on current contract
  - Predecessor contract history
- Purchase Order (PO) history
- Historical subcontract decrements
- Offer from prime contractor to subcontractor during subcontract negotiations
- Offer from subcontractor to prime contractor during subcontract negotiations

What Is Cost or Pricing Data?

- Government Obligation
  - When certified cost or pricing data are required, Gov't is also required to conduct cost analysis in order to evaluate the reasonableness of the cost elements
- Contractor Obligation
  - FAR Clauses 52.215-20/21 instruct the contractor to provide data in accordance with FAR Table 15-2
  - FAR Table 15-2 instructs the contractor that by submitting the proposal, they are granting the CO the right to examine records that formed the basis for the pricing proposal
    - Examination may include those books, records, documents, and other types of factual information (regardless of form or whether the information is specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

What Is Cost or Pricing Data?

- Highlights of FAR 15-2 (found under 15.408)
  - Proposal Index
  - Relationship between total price and contract line items
  - Cost element summaries by Contract Line Item
  - Identification of the following
    - Forward Pricing Rate Agreements
    - Incurred Costs
  - Any information reasonably required to explain the company's estimating process, including --
    - (1) Judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and
    - (2) Nature and amount of any contingencies included in the proposed price.

What Is Cost or Pricing Data?

- Cost Elements based on FAR Table 15-2
  - Labor Hours – time phased breakdown of hours, rates by category AND basis of estimate
  - Bill of Materials identifying item, source, quantity, and price
  - Price Analyses of all subcontracts
  - Cost Analyses of subcontracts exceeding TINA threshold
  - Interdivisional Work Authorizations by cost element
  - Cost or Pricing Data for subcontracts greater than $10M or 10% of prime's price & over TINA threshold (subcontractor's actual proposal & associated data)
  - Adequate Price Competition - data showing degree of competition and basis for establishing source and reasonableness of price

What Is Cost or Pricing Data?

- Cost Elements (cont & based on FAR Table 15-2)
  - Indirect Costs – rates, cost breakdowns, and how costs are computed
  - Other Costs, such as travel and packaging, along with bases for pricing
  - Royalties – see Table 15-2 for specifics
  - Cost of Money - Form CASB-CMF and calculation of proposed amount (usually provided to the Administrative Contracting Officer (ACO) in support of rate negotiations)

What Is Cost or Pricing Data?

Discussion Topics

- What is best approach for handling contractor resistance to providing cost or pricing data?
- Pending FAR Case pertaining to definition of cost or pricing data

Adequate Disclosure

FAR Table 15-2

- Requirement for submission is met when all data have been submitted, actually or by identification to the CO or authorized Representative (e.g. DCAA, DCMA)
- As later information comes into the contractor's possession, it should be submitted promptly to the Contracting Officer in a manner that ***clearly shows how the information relates*** to the offeror's price proposal.

Adequate Disclosure

Example: (UCA Example)

The contractor submits actual hours incurred to date on the program in the following format:

Charge Code	Hours
49393	50
49394	100
49395	10

Discussion: Is this adequate disclosure?

Reliance

- Extent of influence (directly or indirectly) the cost or pricing data had on the Government negotiator's position during negotiations and resultant determination the negotiated price was fair and reasonable
- Occurs when Government negotiators directly or indirectly use or establish a price (or objective) wholly or partly based upon or derived from cost or pricing data the contractor submitted
- Does not occur to extent Government negotiator actually knew data wasn't current, accurate or complete
- Not negated by use of technical evaluations, field reports, audits, etc.

Cutoff Dates

- Date earlier than date of price agreement to which certification of data applies
- Discussion Topics
  - When should cut-off dates be used?
  - Should there be any time limits between cut-off dates and the final date of price agreement?

Certificate of Current Cost or Pricing Data

- Required by law
- Purpose: Certify that data are "current, accurate and complete" as of the date on which the parties agreed upon a price.
- FAR Table 15-2 states contractor must submit cert as soon as practicable after price agreement
- FAR 15.406-2 provides Cert language & states
  - Certification does not apply to accuracy of judgment, but applies to data upon which judgment is based
  - Contractor’s responsibility not negated by lack of personal knowledge
  - Try to reach prior agreement on criteria for cut-off dates
  - Possession of a Cert is not a substitute for Government examining/analyzing the proposal

15.406-2, Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and believe, the cost or pricing data (as defined in section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of ____* are accurate, complete, and current as of ____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreement between the offer and the Government that are part of the proposal.

Firm _____

Signature _____

Name _____

Title _____

Date of execution***_____

*Identify the proposal, request for price adjustment…

**Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is close as practicable to the date of agreement on price

***Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(End Certificate)

Sweep

- Process whereby contractor reviews its records to determine if more current cost or pricing data exist and needs to be disclosed to the Government
- Occurs after agreement on price (handshake) but before contract award
- Usually submitted with certificate
- *Not* required by the Government
  - Tool used by Contractors to avoid defective pricing by submitting data upon discovery of omission
- Limited to
  - Factual data
  - Existing and available prior to price agreement
  - Not previously known or considered by either side
  - Data that would have caused a price increase (offset) or decrease

Sweep

Discussion Topics

- Is contractor obligated to provide an impact statement associated with the sweep?
- Can the contract price be adjusted upward due to sweep?
- Should the Government make downward adjustments for low dollar values?

Negotiations

- Gov’t Responsibility, FAR 15.407-1 (a) If, before agreement on price, the contracting officer learns that any cost or pricing data submitted are inaccurate, incomplete, or not current, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price.

5 Points for Establishing Defective Pricing

(1) The information in question fits the definition of cost or pricing data.

(2) Accurate, complete, and current data existed and were reasonably available to the contractor before the agreement on price.

(3) Accurate, complete, and current data were not submitted or disclosed to the contracting officer or one of the authorized representatives of the contracting officer and that these individuals did not have actual knowledge of such data or its significance to the proposal.

(4) The Government relied on the defective data in negotiating with the contractor.

(5) The Government's reliance on the defective data caused an increase in the contract price.

Sources of TINA Info

- 10 U.S.C. 2306(a)
- FAR Part 15.4
- DOD-IG TINA Handbook
- Contract Pricing Reference Guides, Volumes 3 & 4